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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1791

LYMAN PRINTING AND FINISHING COMPANY, A DIVISION OF M. LOWENSTEIN & SONS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A43-44) is reported at 437 F. 2d 1356. The Board's decision in the unfair labor practice proceeding (Pet. App. A9-42) is reported at 183 NLRB No. 105. Its decision in the related representation proceeding is set forth at Pet. App. A1-8.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1971. The petition for a writ of certiorari was filed on June 7, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Board abused its discretion to determine appropriate collective bargaining units by concluding that the Company's print department employees constituted an appropriate unit.
2. Whether the Board properly refused to allow relitigation in the unfair labor practice case of issues decided in a prior representation proceeding.
3. Whether the Board properly denied the Company's request for discovery in the unfair labor practice proceeding.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), and of the Board's Rules and Regulations are set forth at Pet. App. A46-47, and A52-54.

STATEMENT

Petitioner employs approximately 3200 employees at its Lyman, South Carolina, plant, where it is engaged in the decorating and fabricating of textile products (R. 4, 125, 180).[1] In October 1968, the

[1] "R." refers to the appendix to the briefs in the court below.

Machine Printers and Engravers Association of the United States ("the Union") petitioned the Board for certification as the bargaining representative of the remaining employees in the Printing Department whom it did not already represent.[2] The Company contested the unit sought, contending that the only appropriate unit was one consisting of all the production and maintenance employees, exclusive of those employees already represented by the Union (R. 4-5, 18-19). Pursuant to Section 9(c)(1)(A) of the Act, 29 U.S.C. 159(c)(1)(A), a hearing was held on the petition,[3] at which the following evidence was adduced:

Approximately one-third of the Company's production consists of printed textile goods, the remaining production being equally divided between unprinted white goods and solid colored dyed goods (R. 250, 293). The Print Division consists of the Print, Color, Age and Soap, and Engraving Departments, and the Screen Print Department, which is located in a separate building with its own separate color shops (R. 324). Each of the five departments is under separate supervision (R. 324). The Print Department and the Color Department are located adjacent to each other, physically separated from the remainder of the plant (R. 353). Employees in these two de-

[2] The Union already represented employees in the Company's Engraving Department on a departmental basis and the printers in the Printing Department on a craft basis (R. 125, 183-184).

[3] At the start of the representation hearing, the Union amended its unit request to include the Company's Color Department employees (R. 181-182).

partments punch separate timeclocks, and share lunchroom, restroom, and locker facilities apart from the other employees (R. 322-323, 353).

The actual printing is done on 22 machines, by approximately 70 printers working on 3 shifts (R. 252, 353). Each machine is operated by an apprentice or journeyman printer who is responsible for the proper execution of the pattern (R. 200, 293). Seven years' experience as an apprentice is necessary to become a journeyman (R. 202, 406-407). In addition to the printers, there are approximately 162 other employees who aid in printing the cloth (R. 326, 425). The Color Department consists of 75 employees (R. 294, 425), who spend 5 or 10 percent of their working time delivering dyes to the print machine, but have no other working contact with the Print Department (R. 331). There is no substantial interchange on a continuing basis between the Print Department employees and other plant employees (R. 433-437, 460).

The terms and conditions of employment of employees in the Print and Color Departments are essentially similar to those of all other production and maintenance employees (R. 304-305). However, when the printers have an additional holiday pursuant to their collective bargaining agreement, the entire Print Department does not work but the remainder of the plant employees do (R. 282). The average rates of pay within the Print Department and the Color Department are generally higher than the average rates in the balance of the Company operations (R. 283). In addition to departmental

seniority observed throughout the plant, the Company maintains a promotion policy applicable only to the Print Department employees (R. 351, 430). Employees in the Print Department can advance to printers classification, in line with the industry practice to recruit apprentice printers from the "back tenders" (R. 191, 203, 278).[4]

Upon these facts, the Board found that all of the Print Department employees constituted an appropriate bargaining unit; accordingly the Board directed that, if the majority of the unrepresented employees in that Department voted for the Union, the Union could bargain for them together with the other Print Department employees which it already represented (Pet. App. A7).[5] The Union won the ensuing election and was certified as the collective bargaining representative for all the employees in that unit (R. 127, 42).

Petitioner refused to bargain with the Union, and an unfair labor practice complaint issued alleging that the refusal violated Section 8(a)(5) and (1) of the Act. In its response to the Trial Examiner's order to show cause why a motion for summary judgment should not be granted, the Company contended, *inter alia*, that it was entitled to a hearing

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[4] A "back tender" attaches the cloth to the printing machine and sees that the cloth runs properly into the machine (R. 327).

[5] The Board denied the Company's Motion for Reconsideration, Rehearing and Stay of Election, on the ground that "it contain[ed] nothing not previously considered by the Board" (R. 11, 126).

on the unfair labor practice as a matter of right, that there were inconsistencies in the Board Decision and Direction of Election that required a hearing, and that the unit found by the Board was not appropriate (R. 74-116). In connection with its response, the Company filed (1) an application for subpoenas *duces tecum*; (2) an application to take depositions; and (3) a motion for leave to direct interrogatories to the Board panel which made the unit determination, the Board's Regional Director, and the Company's General Manager (R. 116-120). The Trial Examiner denied the Company's requests on the grounds that they amounted to an attempt to obtain pretrial discovery which was not available in Board proceedings, and that, in any event, the information sought was either irrelevant or privileged (Pet. App. A24-39).

The Trial Examiner granted the General Counsel's motion for summary judgment, on the ground that the Company raised no issues that had not previously been litigated and decided by the Board in the representation proceeding (Pet. App. A9-40). The Board affirmed the Trial Examiner's rulings, and ordered petitioner to bargain with the Union on request (Pet. App. A41-42). The court of appeals, in a *per curiam* opinion, enforced the Board's order (Pet. App. A43-44).

ARGUMENT

1. Section 9(b) of the Act, 29 U.S.C. 159(b), empowers the Board to decide whether "the unit appropriate for the purposes of collective bargaining

shall be the employer unit, craft unit, plant unit or subdivision thereof." The basic question presented is whether the Board abused this broad authority in finding that a unit consisting of all Print Department employees is appropriate for bargaining purposes at the Company's plant. Such an issue, which turns on the particular facts, does not warrant review by this Court. Moreover, the facts summarized above (pp. 3-5) show that there is rational basis for the Board's determination[6] and that therefore the court below was correct in sustaining it.

Petitioner contends (Pet. 9-10) that the Board ignored its own decisions and rules governing the establishment of separate departmental units. In *Mallinckrodt Chemical Workers, Uranium Div.*, 162 NLRB 387, the Board stated that every relevant factor would be considered when severance of employees from an existing bargaining unit was sought. In the instant case, however, since "[t]here is in fact no severance, and no violence is being done to

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[6] Thus, the Print Department's operation affects only one-third of the Company's total production, and a cessation of production in that department would not shut down the other departments (R. 261). The Print Department has its own separate immediate supervision, a departmental seniority policy with special provisions only applicable to job classifications in the Print Department, and a specific separate physical location. The Print Department employees have somewhat higher wage levels than the other Company employees; its non-craft employees work closely with and functionally support the printers; and there is a line of progression within the department, so that employees are able to go from lower paying classifications to the highest, as they acquire further job skills.

any previously existing bargaining unit" (*Rohm & Haas Co.* v. *National Labor Relations Board*, 362 F. 2d 410, 413 (C.A. 4)), many of the factors deemed relevant in *Mallinckrodt* are absent here. Nevertheless, in accord with the general principle of that decision, the Board, in finding a departmental unit to be appropriate, considered all of the factors which were present here, including the separate functions, skills, and supervision of the employees involved.

2. Petitioner contends that (Pet. 12-13) the Board's refusal to permit it to relitigate the unit determination in the unfair labor practice proceeding constituted a denial of due process. This contention rests on the premise that petitioner had no opportunity to challenge the appropriateness of a Plant Department unit in the representation proceeding because a different unit was litigated at the representation hearing. However, while the Union did add the Color Department to its original request to represent the remainder of the Print Department employees (n. 3, *supra*), the Company, in supporting its contention that only a residual plantwide unit was appropriate, fully developed its reasons for opposing any smaller unit, including a Print Department unit. Moreover, after the Board directed an election in the Print Department unit, the Company, in a motion for reconsideration, rehearing, and stay of election (R. 11-29), apprised the Board at length of its reasons why such a unit was inappropriate. In these circumstances, the Board was justified in foreclosing relitigation of the unit determination in

the unfair labor practice proceeding. See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U.S. 146, 157-158; *Magnesium Casting Co.* v. *National Labor Relations Board*, 401 U.S. 137.

3. It is unnecessary to determine whether Section 102.30 of the Board's rules (Pet. App. A52-54) provides for pretrial discovery (see Pet. 16), for, even if it does, petitioner's request for such discovery was properly denied. Petitioner sought—by means of its requests for subpoenas, depositions, and interrogatories—essentially to show that the Board members, in reaching their decision, "arbitrarily and capriciously ignored certain facts in the record and substantially departed from established Board precedent" (Pet. App. A27). In short, petitioner was seeking to probe the mental processes of the Board members. A subpoena or discovery procedure cannot be used to inquire into this privileged area. See *Morgan* v. *United States*, 304 U.S. 1, 18, and 313 U.S. 409, 422; *Davis* v. *Braswell*, 363 F. 2d 600, 604 (C.A. 5).[7]

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[7] The hearing officer's report, which petitioner also sought to discover on the ground that it contained important recommendations to the Board (Pet. 18), is not part of the record in a representation proceeding (see 29 C.F.R. 102.68), because it is merely a summary of the issues and the evidence. Section 9(c)(1) of the Act, 29 U.S.C. 159(c)(1), specifically bars the hearing officer from making "any recommendations" with respect to how the questions presented shall be decided by either the Board or the Regional Director.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1971.

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